LE COPY

No. 686

Office - Supreme Court, U.
FILED
MAR 31 1955
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

F. C. DUMAINE, JR.,
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN J. BURNS
Counsel for Petitioner
F. C. Dumaine, Jr.

BURNS, BLAKE & RICH
1 State Street
Boston, Massachusetts

Blanchard Printing Company, Boston, Mass. — Law Printers

INDEX.

Cases.	Page
Berner v. *Equitable Office Building*, 175 F.2d 218, 220 (C.C.A. 2, 1949)	13
In re Central States Electric Co., 206 F.2d 70 (C.C.A. 4, 1953)	12
In the Matter of Eastern Gas & Fuel Associates, decided May 29, 1950	2
In re Franklin Building Co. 178 F.2d 805 (C.C.A. 7, 1949)	13
In re Inland Gas Co. 73 F. Supp. 785, 791-792, (E.D. Ky. 1947)	12
In re Midland United Co. 159 F.2d 340, 345-347 (C.C.A. 3, 1947)	13
Manufacturers Trust Co. v. *Becker* 333 U.S. 304 at 305	15
Nichols v. *Securities & Exchange Commission* 211 F.2d 412 (C.C.A. 2, 1954)	13
In re Philadelphia & Reading Coal & Iron Co. 61 F. Supp. 120 at 128 (D.C.E.D. Pa. 1945)	13
In re Philadelphia & Western Ry. Co., 64 Supp. 738, 741 (D.C.E.D. Pa. 1946)	13
Woods v. *Bank & Trust Co.* 312 U.S. 262 at 264	15

Statutes.	
Public Utility Holding Company Act (15 U.S.C. Sec. 79k)	2
28 U.S.C. Secs. 1254, 2101	2
Public Utility Holding Company Act (15 U.S.C. Sec. 79 Z-3)	10
Bankruptcy Act, Sec. 249, Chapter X	11, 13
Bankruptcy Act, Sec. 212	13

Regulations.	
Rule U-62 of Securities & Exchange Commission, C.C.H. Federal Securities Law Reporter Vol. 3, Par. 38, 721	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

F. C. DUMAINE, JR.,
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

F. C. Dumaine, Jr. respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the First Circuit, which was dated and entered on December 31, 1954, vacating an order of the United States District Court for the District of Massachusetts and directing the District Court to enter an order approving a plan of reorganization approved by the Securities and Exchange Commission ("Commission") disallowing an Application of the petitioner Dumaine for the allowance of a fee in the reorganization of Eastern Gas and Fuel Associates.

OPINIONS BELOW

The opinion of the Securities and Exchange Commission below is *In the Matter of Eastern Gas and Fuel Associates* decided May 29, 1953 (R. p. 254a). The District Court's opinion (R. p. 292a) is *In the Matter of Eastern Gas and Fuel Associates,* 120 F. Supp. 460 (D.C. Mass., 1953). The opinion of the United States Court of Appeals for the First Circuit is *Securities and Exchange Commission* v. *F. C. Dumaine, Jr.,* 218 F.2d 308 (C.C.A. 1, decided December 31, 1954) amended hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on December 31, 1954. The jurisdiction of the Supreme Court is invoked under the Public Utility Holding Company Act (15 U.S.C. Sec. 79X) and under 28 U.S.C. Secs. 1254 and 2101.

QUESTIONS PRESENTED

1. Whether the sale of securities of a Company, undergoing reorganization under Section 11 of the Holding Company Act, owned as separate property by the wife of a member of a Committee, duly organized under Rule U-62 of the Securities and Exchange Commission, is a transaction in which the Committee member has a "beneficial interest, direct or indirect" within Rule U-62 forbidding trading by Committee members in the securities of a Corporation undergoing reorganization.

2. Whether such a sale by the wife of a Committee member requires forfeiture of the Committee member's compensation from the Corporation for work as Committee member.

STATUTE INVOLVED

The provisions of Section 11(e) of the Public Utility Holding Company Act of 1938 (28 U.S.C. Sec. 79k(e)) are set forth in Appendix B.

STATEMENT

Petitioner F. C. Dumaine, Jr. served as one of two members of a Committee representing the 6% Preferred Shares of Eastern Gas and Fuel Associates, a Massachusetts business trust, in the reorganization of that Company under Section 11(e) of the Holding Company Act. Dumaine's Committee was the only Committee that represented the Preferred Shares. The Commission found that the work of Dumaine's Committee "contributed materially to the proceedings and the development of the plan." (R. p. 264a). However, compensation of $5,000 was denied to Dumaine on the ground that Margaret Dumaine, wife of the petitioner had sold 200 shares of preferred stock during the reorganization proceedings.

The facts surrounding the sale are as follows. Margaret Dumaine had purchased with her separate property (R. pp. 247a, 267a) 200 6% preferred shares of Eastern Gas and Fuel Associates. These securities were purchased in September 1941, about four and one-half years prior to the formation of the Committee and the Committee's appearance on behalf of the 6% preferred shares in the reorganization proceeding. The purchase price in September 1941 was $35⅝ to $37 per share. At the time of the organization of the Committee, the market value of the stock was $81 per share. Margaret Dumaine sold her shares during the reorganization at $79-$79½ per share. (R. p. 267a).

The sale was made by Margaret Dumaine with the knowledge of the petitioner, her husband, but the record indi-

cates the sale was made in good faith. The securities were purchased many years prior to the reorganization and had fully appreciated at the time of the formation of the Committee. Furthermore, Margaret Dumaine's holdings of 200 shares were small compared to the holdings of 11,000 shares in which her husband, the petitioner, had a direct or indirect interest. (R. p. 243a). No other purchases or sales were made by the petitioner or his family. The reason for the sale was the use of the proceeds to make a payment to reduce a bank loan made by Margaret Dumaine for the purchase of the family residence (R. p. 267a). However, there was no evidence that the petitioner Dumaine had a property interest in the home or that he was an obligor on the loan that was paid. There was no evidence of investment advice by Dumaine and the District Court found that there was no "collusion" in the sale (R. p. 295a). There seems to be little question that the sale did not adversely affect Dumaine's efforts on behalf of the preferred shares, whose participation in the reorganization was increased by several million dollars as a result of the Committee's activities. (R. p. 214a).

The Commission denied compensation to petitioner Dumaine solely on the ground that the sale by his wife constituted a violation by Dumaine himself of Rule U-62. This Rule provides in pertinent part as follows: (C.C.H. Federal Securities Law Reporter Vol. 3, par. 38, 721):

> "(2) No securities of the company or companies in reorganization, or of any subsidiary of such company, or of any other associate company thereof which may be affected by the reorganization, shall be bought or sold by or for the account of (whether as principal, agent, trustee, or otherwise) any of the persons specified in clauses (A) to (E) below, or in any transaction in which any such person has any *beneficial interest,*

direct or indirect; nor shall any investment advice with respect to any such securities be given directly or indirectly, by—

(A) Any person who makes any solicitation subject to this rule; or

(B) *Any person connected with any committee or other organization formed to act under the authorization so solicited; or*

(C) Any company as defined in section 2(a)(2) of the Act controlled by any person specified in (A) or (B) above; or

(D) Any company as so defined of which any person specified in (A) or (B) above is an officer, director, partner, or employee; or

(E) Any person who is a partner or employer of any person specified in (A) or (B) above.

No person shall make any solicitation subject to this rule, or act in connection with any committee or other organization formed to act under the authorization so solicited, in the event of non-compliance and with the conditions of paragraph (2) above on the part of any such person or of any company having the relation to such person specified in clauses (C) and (D) thereof, or of any partner or employer of such person."
[Emphasis added]

When that portion of the Plan of Reorganization, dealing with award of fees, was presented for approval to the United States District Court for the District of Massachusetts (pursuant to Section 11(e) of the Public Utility Holding Company Act (15 U.S.C. Sec. 79k(e)), Dumaine objected on the grounds that forfeiture of his compensation was not authorized by Rule U-62 (R. p. 291a). The District Court held in favor of the petitioner Dumaine (R. p. 292a), directing an amendment of the Plan to provide

for the requested compensation to Dumaine, but on appeal by the Commission the Circuit Court of Appeals for the First Circuit reversed. (Appendix A).

The petitioner contends that Rule U-62, being a penal rule working forfeiture of compensation and carrying with it the possibility of criminal penalties, should be construed strictly and that whether so construed or not, it does not proscribe the *bona fide* sale of securities by the wife of a Committee member. Petitioner also submits that the question presented is the subject of substantial conflict among opinions of various Circuit Courts, and that the question is one of importance arising under the Bankruptcy Act as well as the Public Utility Holding Company Act.

I. Rule U-62 Does Not Prohibit the Sale by a Wife of a Committee Member of Her Securities in the Company Undergoing Reorganization.

A. *Description of the Holding of the Commission and of the Court below.*

The purpose of Rule U-62 is to prevent Committee members and other persons from taking advantage of inside information and from reaping profits from trading in securities at the expense of other security holders and the investing public. The rule is both sensible and necessary. However, of necessity it is an automatic rule, requiring forfeiture irrespective of whether the proscribed purchase and sale was an oversight, whether it was based upon or primarily motivated by the use of inside information, and whether it had any effect on the activities of the Committee member. It is submitted that in view of the drastic forfeiture it carries, Rule U-62 should not be applied to any class of persons unless the wording of the Rule clearly embraces them. This is especially true in view of onerous

fiduciary provisions of Rule U-62, requiring that holdings of all persons subject to Rule U-62 be frozen during the reorganization despite any sudden changes in the value of the securities of the Company. In the instant case, petitioner's holdings of 11,000 shares were frozen for a period of five years.

It should be noted that the Commission did not hold and has never contended that the petitioner Dumaine gave financial advice to his wife. The District Court found that no collusion existed (R. p. 295a) and the Commission's Brief to the Circuit Court indicated that the question of investment advice is not an issue in the case. Secondly, the Commission does not contend that Mrs. Dumaine is a "person connected with any committee . . ." within the operation of Rule U-62, for Mrs. Dumaine was not employed by the Committee and assumed none of its duties. The Commission based its decision entirely on its holding that a sale by the wife of a Committee member is a transaction in which a Committee member had, in the words of Rule U-62, a "beneficial interest, direct or indirect" (R. p. 268a). The Commission stated that although a wife was not included in the wording of the rule, her transactions as well as those of any immediate member of the family were "within the clear intendment of the Rule" (R. p. 268a); thus the Commission construes the words "beneficial interest, direct or indirect", to apply even in the absence of any property or contract right in the securities traded or in any entity or entities having a property or contract right in the securities. We submit that contrary to the Commission's interpretation, these words clearly import the existence of a property or contract right. Under the Commission's interpretation, the word "interest" would apparently include a hypothetical benefit or expectation which a person might secure by a sale of securities. Such an interpretation places the application of the

Rule in the realm of speculation as to its real application, and requires persons subject to the Rule to proceed under it at their peril. On the other hand, reference to recognized legal rights make Rule U-62 a clear guide to permitted conduct.

B. *Words of Art Used in Rule U-62 and Organic Laws Administered by the Commission.*

The position of the Commission is contrary to prior interpretations by it of substantially the same words as those used in Rule U-62. Section 16 of the Securities and Exchange Act of 1934 (16 U.S.C. Sec. 78P) which prohibits certain short term profits by corporate insiders, applies to "every person who is directly or indirectly the beneficial owner" of 10% of any class of equity security. The transposition by Rule U-62 of the word "owner" to the word "interest" is a minor change which was not designed to apply beyond the area of contract or property rights but was intended to make clearer the application of the Rule to so-called derivative interests—that is, indirect interests that exist by virtue of ownership in a commercial or legal entity, such as a corporation or a syndicate. Section 16 of the Securities Exchange Act was early held by the Commission's General Counsel not to apply to sales of securities by a wife unless the husband had power to vest or revest the securities in himself or unless by reason of an understanding or other arrangement the husband had benefits substantially equivalent to those of ownership. *Securities Exchange Act* Release No. 175 April 16, 1935, published in 11 *Federal Register* 10968.

The foregoing opinion was the only one of the Commission which construed the focal words put into Rule U-62. All forms of the Commission under Section 16 and under similar provisions in Section 17(a) of the Holding Com-

pany Act omitted inquiry of stock holdings of family members (Forms U-17-1, U-17-2 and Forms 4, 5 and 6, CCH *Federal Securities Law Reporter* Vol. 3, Pars. 40,901, 40,921; Vol. 2 Pars. 33,701 and 33,721). Had the Commission intended to apply the words "direct or indirect ownership" or "direct or indirect interest" to members of the family, it would have spelled out this meaning at the time its Rules were promulgated, for its standard practice is to specify members of a family when they are regulated. A good example are the Proxy Rules of the Commission governing the solicitation of proxies under the Securities Exchange Act of 1934. When these Rules are intended to apply to relatives of a particular person, they specifically mention relatives. See for example Rule X-14A-1 of the Securities and Exchange Commission defining the word "associate" as including "any relative or spouse of such person, or any relative of such spouse". (C.C.H. Federal Securities Reporter Par. 25,602 et seq.).

C. *Liberal Construction of a Penal Rule Based on the "Intendment" Rather than the Wording of the Rule Is Unwarranted.*

The Commission held that although Rule U-62 did not mention the transactions of a member of a family of the Committee member, nevertheless a member of a family was within the "intendment" of the Rule (R. p. 368a).

Admittedly, Rule U-62 works a forfeiture irrespective of the innocence of the persons violating the Rule and irrespective of the fact, as here, that the prohibited transaction could not and did not adversely affect the efforts of the Committee member on behalf of the class represented. Furthermore, violation of Rule U-62 carries with it the possibility of criminal penalties. Wilful violation of the Rules and Regulations of the Securities and Exchange Com-

mission is made a crime by the Public Utility Holding Company Act (15 U.S.C. Sec. 79 Z-3). The reading of unexpressed meanings into a penal rule of this kind is extremely burdensome upon those who acted in good faith. It is even more unfair in view of the fact that it operates as a penalty upon individuals who may have no control over the prohibited transaction. Furthermore, as the District Court pointed out (R. p. 294a), the Commission's construction would have the effect, retroactively, of freezing the investments of persons who were not fiduciaries under Rule U-62. The sudden retroactive change by the Commission of a construction (of words of art commonly existing in its Rules) that has existed for thirteen years seems all the more harsh in view of the fact that the Commission has the broadest powers under Sections 11 and 20 of the Holding Company Act to frame a rule which would apply to transactions of members of the family of a Committee member. Yet, the Commission has not changed its Rule and prefers that its full scope remain uncertain. Indeed, it would extend Rule U-62 to "immediate members of the family," which is in turn a vague and undefined term; this construction by the Commission seems especially unwarranted in view of the fact that Federal statutes invariably specify when their intent is to treat an individual and his spouse or family as a single entity. For example, special provisions of the Internal Revenue Code have been designed to embrace family transactions. I.R.C. Sec. 24(b)(1).

II. Cases on the Question Presented, Decided by the Lower Courts Under Rule U-62 and Under Section 249 of Chapter X of the Bankruptcy Act, Are in Substantial Conflict.

The Court below held that Rule U-62 applies to the sale of stock by the wife of a Committee member or other fiduciary governed by Rule U-62, at least where the husband had knowledge of the sale. The Court reserved judgment on the question of the applicability of Rule U-62 where the husband had no knowledge of the sale. The Court also declined to say whether it would extend Rule U-62 to "immediate members of the family", as contended by the Commission. It should be noted that Rule U-62 does not mention either fiduciary's knowledge or lack of it, nor does it mention family relationship, but since the Circuit Court's decision turns on these considerations, the decided cases are examined below from this point of view.

It should also be noted that the Circuit Court relied on cases decided under Section 249 of Chapter X of the Bankruptcy Act as being in harmony with its holding (App. A, p. 24). Section 249 contains a provision, comparable to Rule U-62, which prohibits the payment of compensation to Committee members who trade in securities of the Company undergoing reorganization under Chapter X. Section 249 provides as follows:

> "Any person seeking compensations for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a *beneficial interest, direct or indirect,* has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensa-

> tion or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at anytime after assuming to act in such capacity, has purchased or sold such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred." (Emphasis added)

It should be noted that Section 249 used the same phrase as Rule U-62 to define a transaction in which the fiduciary has an interest. The phrase used is "beneficial interest, direct or indirect". Indeed this phrase was probably inserted into Section 249 by the Commission itself which wrote the first draft of Chapter X.

Examination of the cases decided under Rule U-62 and Section 249 shows a substantial conflict among them.

In view of the holding of the Circuit Court below the decided cases may be divided into three kinds—those in which the fiduciary had knowledge of the transaction, those in which he did not and those in which the Court apparently deemed the fact of knowledge unimportant.

The instant case holds that trading by the spouse of a fiduciary with the knowledge of the fiduciary constitutes a violation of Rule U-62 and warrants forfeiture of compensation. No other case under Rule U-62 or Section 249 has turned expressly on the fact that the fiduciary had knowledge of the transaction although knowledge has existed in other cases.

A number of cases hold that a sale by the spouse is attributable to the husband, but since these cases do not state whether the fiduciary had knowledge of the transaction, they presumably do not attach any importance to this factor. *In re Inland Gas Co.* 73 F. Supp. 785, 791-792, (E.D. Ky. 1947); *In re Central States Electric Company*

206 F.2d 70 (C.C.A. 4, 19533). In the case of *In re Midland United Company* 159 F.2d 340, 345-347 (C.C.A. 3, 1947), the fiduciary had knowledge of the transaction but the Court did not say whether it deemed this factor decisive in holding the fiduciary in violation of Section 249. Two cases which refused to disallow compensation under Section 249 of the Bankruptcy Act, *In re Philadelphia & Reading Coal & Iron Co.* 61 F. Supp. 120 at 128 (D.C.E.D. Pa., 1945) and *In re Philadelphia & Western Ry. Co.*, 64 F. Supp. 738, 741 (D.C.E.D. Pa. 1946) may have been inferentially overruled in the Third Circuit by the *Midland* Case, *supra*, but there is some doubt about their status since in the former case there was no knowledge by the fiduciary and in the latter case the fact of knowledge is not mentioned.

The case of *In re Franklin Building Company* 178 F.2d 805 (C.C.A. 7, 1949) was decided under Section 212 of the Bankruptcy Act but is comparable to those decided under Section 249. It held that the purchases of a spouse and other family members did not justify disallowance of claims, under Section 212 of the Bankruptcy Act, acquired during reorganization. The purchases were made under circumstances indicating knowledge of the fiduciary.

Nichols v. *Securities & Exchange Commission* 211 F.2d 412 (C.C.A. 2, 1954) held per Judge Learned Hand in a situation where the sale was without knowledge of the husband that Rule U-62 was not violated. The opinion below in the case at bar expressly left this question open and stated that it was not in conflict with *Nichols*. Nevertheless, the case at bar conflicts with *Berner* v. *Equitable Office Building Corporation*, 175 F.2d 218, 220 (C.C.A. 2, 1949). This case arose under Section 249. As in the *Dumaine* case, the fiduciary had knowledge of the family transaction. The facts in the *Berner* case differ from the instant case in that a brother-in-law was involved instead of a spouse. However, since the Commission has taken the position that

all members of the "immediate family" are prohibited from trading and since the Commission took the position in the *Berner* case that a brother-in-law is included in that category, there seems to be little real distinction between the *Berner* case and the case at bar. In the *Berner* case, the Second Circuit held that there is a presumption that a fiduciary does not have an "interest" in shares owned by his brother-in-law. However, since the evidence showed that the fiduciary had given investment advice to his brother-in-law, the court held that this was a breach of trust and remanded the case to determine whether the breach of trust warranted forfeiture of compensation. Since the factor of investment advice does not exist in the *Dumaine* case, this latter phase of the *Berner* decision is immaterial. It is clear from the *Berner* case that the view of the Second Circuit is that mere family relationship, without more, does not create an interest of the fiduciary in the family member's property, despite knowledge by the fiduciary of the family member's transactions.

In summary, the First and Third Circuits hold that a fiduciary has an interest in the transactions of a member of his immediate family where the fiduciary has knowledge of the transaction. Two prior District Court decisions in the Third Circuit leave some doubt as to the full application of the Third Circuit holding. The Fourth Circuit and the District Court for the Eastern District of Kentucky hold the fiduciary responsible because of family relationship and give no consideration to the factor of knowledge. The Second Circuit holds that the fiduciary has no interest in the separate property transactions of family members, irrespective of knowledge of the transactions. The Seventh Circuit appears to be in accord with the Second Circuit although the Seventh Circuit case arose under Section 212 of the Bankruptcy Act. There are minor factual variations in all these cases and some were decided under the Bank-

ruptcy Act, whereas others were decided under Rule U-62. However, all except the Seventh Circuit Case have sought to construe the phrase "direct or indirect beneficial interest". There is no possibility of agreement among Circuit Courts as to the construction of this phrase. The matter is now ripe for review. Furthermore, the question presented involves a subject—that of fiduciary obligations in corporate reorganizations — which this Court has deemed to be of sufficient importance to justify grant of certiorari even in the absence of a conflict among Circuits. *Manufacturers Trust Co.* v. *Becker,* 333 U.S. 304 at 305. *Woods* v. *City Bank & Trust Co.,* 312 U.S. 262, at 264.

CONCLUSION

It is submitted that this case presents an important question of Federal law which has been applied inconsistently by the Circuit Courts. For these reasons it is respectfully submitted that this petition for a writ of certiorari be granted.

JOHN J. BURNS
Counsel for Petitioner
F. C. Dumaine, Jr.

BURNS, BLAKE & RICH
1 State Street
Boston, Massachusetts

Appendix A.

United States Court of Appeals

For the First Circuit

No. 4852.

SECURITIES AND EXCHANGE COMMISSION,

APPELLANT,

v.

F. C. DUMAINE, JR., ET AL.,

APPELLEE.

No. 4853.

KOPPERS COMPANY, INC.,

APPELLANT,

v.

SECURITIES AND EXCHANGE COMMISSION,

APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[120 F. Supp. 460]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

William H. Timbers, General Counsel, with whom *Myron S. Isaacs*, Associate General Counsel, *Myer Feldman*, Special Counsel, and *Coleman J. Lesser*, Attorney, were on brief, for Securities and Exchange Commission.

Harold B. Dondis, with whom *John J. Burns* and *Burns, Blake & Rich* were on brief, for F. C. Dumaine, Jr.

Carleton M. Crick, with whom *Edmund S. Ruffin, Jr.*, was on brief, for Koppers Company, Inc.

OPINION OF THE COURT.
December 31, 1954.

WOODBURY, *Circuit Judge*. These two appeals from a Supplemental Order of the United States District Court for the District of Massachusetts present, respectively, questions with respect to allowance of a fee and questions with respect to disallowance of expenses both connected with the reorganization of Eastern Gas & Fuel Associates under § 11(e) of the Public Utility Holding Company Act of 1935. 49 Stat. 822.

Eastern Gas & Fuel Associates came into being under the laws of Massachusetts as a voluntary association in July 1929. It was created by the Koppers Company,[1] for the purpose of combining the properties of two of its subsidiaries, Philadelphia Coke Company and The Connecticut Coke Company, with the properties of a holding company also controlled by Koppers interests called Massachusetts Gas Companies which owned all of the securities of two local operating utilities, Boston Consolidated Gas Company and Old Colony Gas Company. Prior to Eastern's reorganization Koppers owned 78% of Eastern's outstanding common stock and 13.4% of its 6% cumulative preferred stock. Thus Eastern, by reason of its ownership of all of the outstanding securities of two operating gas companies, Boston Consolidated and Old Colony, was a holding company as defined in § 2(a)(7) of the Act. So also was Koppers since it owned more than 10% of the voting securities of Eastern. Both Koppers and Eastern registered with the Commission under § 5(a) of the Act and thus became subject to the provisions of its § 11.

In May 1945, the Commission instituted proceedings

[1] This corporation merged with related corporations in 1944 to form the appellant, Koppers Company, Inc., referred to herein as Koppers, a Delaware corporation.

against Eastern under § 11(b)(2)[2] of the Act and in June 1945, Eastern filed a plan under § 11(e). Extended hearings were held, amended plans were filed, the evidence was reopened after the record had once been closed, and numerous participants filed statements of views, until at last in February 1950 the Commission issued its Findings and Opinion in which it concluded that Eastern's plan as amended could be approved if it were further amended to provide, among other matters, that Eastern would pay on the application of interested persons such fees and expenses in connection with its reorganization as the Commission should award or allocate. Eastern amended its plan accordingly and the plan as modified was approved by the Commission. The District Court ordered the plan enforced and it has been consumated.

There is no need here to describe the details of Eastern's plan of reorganization. It will suffice to say that the Commission in approving the plan, and the District Court in ordering it enforced, both specifically reserved their respective jurisdictions with respect to the determination of the persons entitled to fees or expenses, the reasonableness of the same and their appropriate allocation.

In due course applications for allowance of fees and reimbursement for expenses were filed by numerous participants in Eastern's reorganization proceedings and hearings were held on the applications after appropriate notice. The Commission's Division of Public Utilities filed a statement of views, to which various applicants filed exceptions supported by briefs, and the Commission heard oral arguments. As a result the Commission in the exercise of its reserved juridiction over fees and expenses filed its Find-

[2] At the same time the Commission issued an order of divestment under § 11(b)(1) of the Act against Koppers which at Koppers request the Commission held in abeyance until after the consumation of Eastern's plan of reorganization.

ings of Fact and Opinion, in accordance with which it issued a Supplemental Order in which, *inter alia,* it denied the application of F. C. Dumaine, Jr., appellee in No. 4852, for a fee, and the application of Koppers Company, Inc., appellant in No. 4853, for expenses. Both Dumaine and Koppers filed objections to the Commission's action in the court below and that court after hearing entered a Supplemental Order wherein in accordance with the views expressed in a memorandum opinion it ordered the portions of Eastern's plan covering the matter of fees and expenses enforced except as to Dumaine's fee. The court disagreed with the Commission as to this and ordered that Dumaine be paid a fee of $5,000 by Eastern. Wherefore the court remanded the matter to the Commission for the purpose of modifying Eastern's plan and its Supplemental Findings and Opinion accordingly. Both Koppers and the Commission have appealed from this Supplemental Order of the District Court.

The Supplemental Order of the District Court from which these appeals were taken is not final in form. Nevertheless, nothing remains for the Commission to do in carrying out the District Court's order but to amend its Supplemental Findings and Opinion and Eastern's plan of reorganization to provide for the payment of a fee of $5,000 to Dumaine. This is a purely ministerial act not calling for the exercise of any discretion on the Commission's part. The District Court has adjudicated Dumain's right to a fee with all the finality it can, and it has taken the only means it has available to enforce its adjudication. Under these circumstances we think the District Court's order in spite of its form constitutes a "final decision" appealable under Title 28 U.S.C. § 1291. See *Buscaglia* v. *District Court of San Juan,* 145 F.2d 274, 281 (C.A. 1, 1944). See also *S.E.C.* v. *Central Illinois Corp.,* 338 U.S. 96 (1949) wherein the Supreme Court in a comparable situation did not even

mention the existence of any question of appellate jurisdiction.

* * *

[That portion of the opinion relating to the appeal of Koppers Company is omitted.]

* * *

We turn now to the Commission's appeal from that part of the District Court's order in effect requiring Eastern to pay a fee of $5,000 to Dumaine which invokes quite different principles in that the interpretation of one of the Commission's General Rules and Regulations is involved.

F. C. Dumaine, Jr., had a direct or indirect interest in a substantial block of Eastern's 6 percent preferred stock when proceedings for its reorganization were initiated, and in 1946 he became a member of a committee duly qualified under the Commission's Rule U-62 to represent the holders of that issue of stock. The Commission found that the Committee through its counsel and experts "contributed materially to the proceedings and the development of the plan," and that Dumaine worked closely with the Committee's counsel, "was consulted on all major issues of the case, and performed many administrative duties in connection with the Committee's work." The Commission did not in any way intimate that it thought the fee requested by Dumaine was excessive or unreasonable in view of his services.[3] It nevertheless denied Dumaine's application for a fee on the ground of a sale of 200 shares of the 6 percent preferred stock made by Dumaine's wife while Eastern's reorganization was in process. It found that Mrs. Dumaine had purchased these shares with her own funds in 1941, that she sold them wth her husband's knowledge at a profit after the preferred stockholders' Committee was

[3] Reimbursement by Eastern for expenses of the Committee in the amount of $9,599.51 was ordered by the Commission and approved by the District Court.

formed, and that she used the proceeds of the sale to "reduce a bank loan made by her for the purchase of the family residence, thus benefiting her husband." This, the Commission said, constituted a violation of its Rule U-62 (g)(2), quoted in material part in the margin,[4] and disqualified Dumaine from an award of compensation from Eastern.

The Commission frankly admitted that its Rule does not specifically forbid stock transactions by a committee member's wife with her own funds. It said:

> " . . . While the Rule does not specify that members of the immediate family are within the Rule, we consider that the clear intendment of Rule U-62 is that trading by members of the immediate family of any person connected with a committee falls in the category of prohibited trading by that person. In our opinion, a person connected with a committee has such an interest in any profit which might result from his immediate family's trading, even though such interest may be indirect, that it can influence his activities and conduct as a committee member. Accordingly, we think that, as in bankruptcy cases, our rule must be considered as applying the same prophylactic treatment with respect to trading by the immediate family of a committee representative as to his own trading. Any other practice could lead to widespread abuse by applicants who sought to circumvent the trading prohibi-

---

[4] "No securities of the company . . . in reorganization, . . . shall be bought or sold by or for the account of (whether as principal, agent, trustee, or otherwise) any of the persons specified in clauses (A) to (E) below, or in any transaction in which any such person has any beneficial interest, direct or indirect; . . .

* * *

(B) Any person connected with any committee or other organization formed to act under the authorization so solicited; . . . "

tion by a fictitious separation of actions and interests of family members."

The District Court disagreed. It felt that the Rule would not stand the interpretation put upon it by the Commission. In the court's view the Commission's construction of its Rule as requiring, without "plain forewarning," either that Dumaine sacrifice a fee for valuable services or that his wife freeze valuable assets for an indefinite time was "unwarranted and unreasonable." Wherefore it ordered the Commission to require Eastern to pay a $5,000 fee to Dumaine and the Commission appealed.

We are not here called upon either to accept or to reject the Commission's broad interpretation of its Rule as embracing within its sweep without any attempt at definition the "immediate family of any persons connected with a committee," whoever such persons may be. *Cf. Nichols* v. *Securities and Exchange Commission*, 211 F.2d 412 (C.A. 2, 1954). The specific question before us is whether the Rule is violated when during a reorganization the wife of a member of a stockholders' committee, with her husband's knowledge, sells shares of stock represented by her husband's committee which she purchased with her own personal funds before reorganization, and uses the proceeds of the sale to reduce a loan incurred in the purchase of a family residence. Our discussion is confined to the precise question before us; we express no opinion on any other.

Clearly the phrase "any beneficial interest, direct or indirect" covers every property or contract right, legal or equitable, in securities traded by any of the persons specified in the Rule. But we do not think that the Rule must necessarily be construed as limited in its reference to recognized legal or equitable rights. By the Rule the Commission, quite properly and very obviously, was attempting to implement and enforce the wholesome principle

that committee members should wholeheartedly serve only one master, the holders of the stock represented by the committee, without any of the purely personal distractions necessarily incident to trading in the stock for individual gain. We think the Rule should be construed with its obvious purpose in mind, and that so construed its language is broad enough to cover trading in the stock by a wife with her husband's knowledge, even though she uses her own funds for the purpose.

This does not mean, and is not to be taken for one moment as even indirectly implying, that a husband today still retains some vestigial remnant of his ancient rights in his wife's individual property. We rest our conclusion on the proposition that as a practical matter an economic benefit to a wife is indirectly an economic benefit to a husband, at least when husband and wife are living together as a family unit, and on the further proposition that when a wife with her husband's knowledge trades in a stock represented by a committee of which the husband is a member, the husband cannot possibly be as disinterested in his role of committee member as one in a fiduciary capacity ought to be. *Cf. Helvering* v. *Clifford*, 309 U.S. 331, 335-336 (1940).

Perhaps the Commission might by rule categorically forbid a wife's personal trading in securities represented by a committee on which her huband was serving even when she did so without her husband's knowledge, since evidence of collusive action by husband and wife is ordinarily inaccessible and only by such a rule could disinterestedness on the part of committee members be assured. But however that may be, certainly the Commission could, in the application of what it calls "prophylactic treatment," forbid a wife's trading in such securities with her husband's knowledge. And we think this is what the Commission did in its Rule U-62, construed with its obvious purpose in

mind, by the use of the phrase "any beneficial interest, direct or indirect." Furthermore, we think this construction of the Rule is clear enough to give Dumaine, as a fiduciary, fair warning as to the possible consequences to him or his wife's transaction.

Moreover, this interpretation of the Rule is in harmony with the interpretation put upon the comparable, but if anything less compelling, language of § 249 of the Bankruptcy Act[5] by the Court of Appeals for the Third Circuit in *In re Midland United Company,* 159 F.2d 340, 347 (1947) and by the Court of Appeals for the Fourth Circuit in *In re Central States Electric Company,* 206 F.2d 70, *cert. denied sub nom. Henis* v. *Egan,* 346 U.S. 899 (1953). Nor does our interpretation of the Rule conflict with the holding of the Court of Appeals for the Second Circuit in the *Nichols* case cited above, for in that case the wife's transactions were unknown to the husband.

The order of the District Court is vacated and the cause is remanded to that Court for the entry of an order in conformity with the views expressed in this opinion.

---

[5] "No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity who at any time after assuming to act in such capacity has purchased or sold such claims or stock, * * * ."

Appendix B.

Section 11(e) of the Public Utility Holding Company Act (28 U.S.C. Sec. 79k(e)

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.